YIM PECK HA v. PP

COURT OF APPEAL, PUTRAJAYA
MD RAUS SHARIF PCA
BALIA YUSOF WAHI JCA
MOHD ZAWAWI SALLEH JCA
[CRIMINAL REVIEW NO: W-06-4-09-2014]
15 JUNE 2015

JURISDICTION: *Court of Appeal – Review – Application for exercise of inherent jurisdiction to review and set aside earlier decision – Whether inherent jurisdiction exercised only in limited and exceptional circumstances – Whether grounds relied on by applicant related to matters of fact – Whether seeking to reopen evidence which had been heard and finally determined – Whether review jurisdiction could be used to question finding of facts – Whether applicant showed earlier decision was wrong and caused injustice to applicant – Whether applicant attempting to turn application into appeal – Whether review warranted*

The complainant in this case was one Nirmala Bonat ('Nirmala'), who was the applicant's previous maid. Nirmala lodged a report against the applicant claiming that the applicant had abused her in four separate incidents, the subject matter of the four charges under ss. 325 and 326 of the Penal Code against the applicant. The Sessions Court found the applicant guilty on the first three charges and sentenced the applicant to 18 years' imprisonment, which were ordered to run concurrently, and acquitted the applicant of the fourth charge. Dissatisfied, the applicant appealed to the High Court, whilst the prosecution appealed against the acquittal of the fourth charge. The High Court, *inter alia*: (i) dismissed the applicant's appeal against conviction in respect of the first and second charges but allowed the appeal against the sentence and the sentence was reduced to five years for each charge and the sentence ordered to run consecutively; (ii) allowed the applicant's appeal in respect of the third charge and set aside the sentence; and (iii) allowed the prosecution's appeal in respect of the fourth charge and sentenced the applicant to two years' imprisonment. The applicant's appeal to the Court of Appeal was dismissed. While the criminal proceedings were ongoing, Nirmala had also commenced a civil suit against the applicant and her husband, where she claimed damages for the injuries sustained. In this review application, the applicant was seeking the court to exercise its inherent jurisdiction to review and set aside its earlier decision. The main thrust of the applicant's submission was that Nirmala had proffered two conflicting sets of evidence, one version in the criminal trial and a completely contradictory version in the civil trial, and therefore, there was a miscarriage of justice.

Held (dismissing application)
Per Md Raus Sharif PCA delivering the judgment of the court:

(1) Only in very limited and exceptional circumstances that this court, as an apex court, has an inherent jurisdiction to review, and if the circumstances so warrant, to set aside an earlier decision. In exercising such powers, the court should not position itself as if it was hearing an appeal. In a review application, it is not the duty of the court to re-examine the final verdict reached by the previous panel with a view of coming to a different conclusion. Such an exercise must only be undertaken sparingly and with circumspection, a proper sense of responsibility and wisely to remove any injustice. (para 14)

(2) The grounds relied on by the applicant to urge this court to review its previous decision were matters of fact. It is trite that an appellate court should be slow in disturbing the finding of fact by the lower court, more so in a review application. The review jurisdiction should never be allowed to be used to question a finding of a court on questions of fact. It was not open to this court to upset the findings of fact or venture into questions of fact which had become final. The truth or otherwise of the allegations made in evidence recorded in the civil case could not be dwelled into by this court in exercise of its review jurisdiction. This court would interfere only with a view to prevent the abuse of the process of any court or otherwise to secure the ends of justice. (paras 16 & 17)

(3) The applicant had not made out any case warranting the interference of this court and had not satisfied that there was any probability of the Court of Appeal's earlier judgment being wrong and that injustice had occurred to the applicant. What the applicant was in effect asking the court was to reopen or review the evidence which had already been heard and finally determined by this court, *ie*, the applicant was trying to turn this application into an appeal. The applicant had not satisfied the threshold required for a review. Thus, this application did not fall within the very limited grounds and very exceptional circumstances in which a review may be made by this court of its own decision. (paras 18-20)

Bahasa Malaysia *Headnotes*

Pengadu dalam kes ini ialah Nirmala Bonat ('Nirmala'), bekas pembantu rumah pemohon. Nirmala membuat laporan terhadap pemohon menyatakan bahawa pemohon mendera Nirmala dalam empat insiden berasingan, hal perkara empat pertuduhan bawah ss. 325 dan 326 Kanun Keseksaan terhadap pemohon. Mahkamah Sesyen mendapati pemohon bersalah atas tiga pertuduhan pertama dan menjatuhkan hukuman 18 tahun penjara terhadap

pemohon, yang diperintahkan berjalan serentak, dan melepaskan pemohon atas pertuduhan keempat. Tidak berpuas hati, pemohon merayu ke Mahkamah Tinggi, manakala pihak pendakwaan merayu terhadap pelepasan daripada pertuduhan keempat. Mahkamah Tinggi, antara lain: (i) menolak rayuan pemohon terhadap sabitan berkaitan pertuduhan pertama dan kedua tetapi membenarkan rayuan terhadap hukuman dan hukuman dikurangkan pada lima tahun untuk setiap pertuduhan dan diperintahkan berjalan berturut-turut; (ii) membenarkan rayuan pemohon berkaitan dengan pertuduhan ketiga dan mengetepikan hukuman; dan (iii) membenarkan rayuan pendakwaan berkaitan dengan pertuduhan keempat dan menjatuhkan hukuman dua tahun penjara terhadap pemohon. Rayuan perayu ke Mahkamah Rayuan ditolak. Semasa prosiding jenayah sedang berjalan, Nirmala juga memulakan guaman sivil terhadap pemohon dan suaminya, dan menuntut ganti rugi untuk kecederaan yang dialaminya. Dalam permohonan semakan ini, pemohon meminta mahkamah melaksanakan bidang kuasa sedia ada untuk menyemak dan mengetepikan keputusan terdahulunya. Asas utama hujahan pemohon adalah bahawa Nirmala mengemukakan dua set keterangan yang bertentangan, satu versi dalam perbicaraan jenayah dan satu versi yang bertentangan sama sekali dalam perbicaraan sivil, dan oleh itu, berlaku salah laksana keadilan.

Diputuskan (menolak permohonan)
Oleh Md Raus Sharif PMR menyampaikan penghakiman mahkamah:

(1) Hanya dalam hal keadaan terhad dan terkecuali mahkamah ini, sebagai mahkamah tertinggi, mempunyai bidang kuasa sedia ada untuk menyemak semula, dan jika keadaan mewajarkan, untuk mengetepikan keputusan terdahulu. Apabila melaksanakan kuasa-kuasa sedemikian, bukan tugas mahkamah untuk memeriksa semula keputusan terakhir yang dicapai oleh panel terdahulu dengan niat mencapai kesimpulan berbeza. Pelaksanaan sedemikian hanya boleh dibuat secara jarang-jarang dan dengan berhati-hati, dengan sifat penuh tanggungjawab dan bijak untuk menghilangkan ketidakadilan.

(2) Alasan yang disandar oleh pemohon untuk mendesak mahkamah menyemak semula keputusan terdahulu adalah perkara fakta. Adalah matan bahawa mahkamah rayuan tidak sepatutnya cepat mengganggu dapatan fakta oleh mahkamah rendah, lebih-lebih lagi dalam permohonan semakan. Bidang kuasa semakan tidak sepatutnya dibenarkan untuk digunakan untuk mempersoalkan dapatan mahkamah atas soalan fakta. Tidak terbuka pada mahkamah ini untuk mengganggu dapatan fakta atau mencuba mempersoalkan fakta yang telah dimuktamadkan. Kebenaran pertuduhan atau sebaliknya yang dibuat dalam keterangan yang direkodkan oleh mahkamah dalam kes sivil tidak

boleh diperkatakan oleh mahkamah ini dalam melaksanakan bidang kuasa semakan. Mahkamah ini akan campur tangan hanya dengan niat menghalang penyalahgunaan proses mahkamah atau sebaliknya untuk mendapatkan keadilan.

(3) Pemohon tidak membuktikan apa-apa kes yang mewajarkan campur tangan mahkamah ini dan tidak memenuhi bahawa terdapat kemungkinan penghakiman Mahkamah Rayuan terdahulu adalah salah dan ketidakadilan berlaku pada pemohon. Apa yang sebenarnya dipohon oleh pemohon adalah untuk membuka semula dan menyemak keterangan yang telah didengar dan diputuskan secara muktamad oleh mahkamah ini, iaitu, pemohon mencuba menukar permohonan ini pada rayuan. Pemohon tidak memenuhi ambang yang diperlukan untuk semakan. Oleh itu, permohonan ini tidak terangkum dalam alasan-alasan terhad dan terkecuali tersebut yang membolehkan semakan oleh mahkamah ini terhadap keputusannya sendiri dibuat.

Case(s) referred to:
Ahmadi Yahya v. PP [2012] 7 CLJ 113 CA ***(refd)***
Asean Security Paper Mills Sdn Bhd v. Mitsui Sumitomo Insurance (Malaysia) Bhd [2008] 6 CLJ 1 FC ***(refd)***

Legislation referred to:
Penal Code, ss. 325, 326

For the appellant - Hisyam Teh Poh Teik & Lam Cheng Wun; M/s Teh Poh Teik & Co
For the respondent - Norina Bahadun & Mohd Fairuz Johari; DPPs

Reported by S Barathi

JUDGMENT

Md Raus Sharif PCA:

Introduction

[1] This is a review application. The applicant, Yim Peck Ha, is asking this court to exercise its inherent jurisdiction to review and set aside its earlier decision.

[2] This court on 1 October 2012, by another coram, had dismissed the applicant's appeal, thus affirming the decision of the High Court in exercising its appellate jurisdiction in convicting the applicant for three offences under the Penal Code. This court had also affirmed the sentences imposed against the applicant.

[3] We heard the application on 4 December 2014. After hearing the parties, we adjourned the matter for our decision. We now give our decision and the reasons for the same.

Background Facts

[4] The applicant was charged with and tried by the Sessions Court at Kuala Lumpur in respect of three charges under s. 326 and one charge under s. 325 of the Penal Code. The four charges read as follows:

First Charge:

Bahawa kamu pada waktu siang hari dalam bulan Januari 2004 di alamat No. 33B-25-6, Villa Putera, Jalan Tun Ismail, di dalam daerah Dang Wangi, di dalam Wilayah Persekutuan Kuala Lumpur telah menyebabkan cedera parah kepada Nirmala Bonat PP No. AG 247964 dengan menggunakan seterika panas yang merupakan benda hangat dan oleh yang demikian itu kamu telah melakukan satu kesalahan di bawah seksyen 326 Kanun Keseksaan dan boleh dihukum di bawah seksyen yang sama.

Second Charge:

Bahawa kamu pada waktu siang hari dalam bulan Mac 2004 di alamat No. 33B-25-6, Villa Putera, Jalan Tun Ismail, di dalam daerah Dang Wangi, di dalam Wilayah Persekutuan Kuala Lumpur telah menyebabkan cedera parah kepada Nirmala Bonat PP No. AG 247964 dengan menggunakan seterika panas yang merupakan benda hangat dan oleh yang demikian itu kamu telah melakukan satu kesalahan di bawah seksyen 326 Kanun Keseksaan dan boleh dihukum di bawah seksyen yang sama.

Third Charge:

Bahawa kamu pada waktu siang hari dalam bulan April 2004 di alamat No. 33B-25-6, Villa Putera, Jalan Tun Ismail, di dalam daerah Dang Wangi, di dalam Wilayah Persekutuan Kuala Lumpur telah menyebabkan cedera parah kepada Nirmala Bonat PP No. AG 247964 dengan menggunakan seterika panas yang merupakan benda hangat dan oleh yang demikian itu kamu telah melakukan satu kesalahan di bawah seksyen 326 Kanun Keseksaan dan boleh dihukum di bawah seksyen yang sama.

Fourth Charge:

Bahawa kamu pada 17.5.2004 jam lebih kurang 3.00 petang di alamat No. 33B-25-6, Villa Putera, Jalan Tun Ismail, di dalam daerah Dang Wangi, di dalam Wilayah Persekutuan Kuala Lumpur telah menyebabkan cedera parah kepada Nirmala Bonat PP No. AG 247964 dengan menggunakan seterika panas yang merupakan benda hangat dan oleh yang demikian itu kamu telah melakukan satu kesalahan di bawah seksyen 326 Kanun Keseksaan dan boleh dihukum di bawah seksyen yang sama.

[5] The complainant in this case is one Nirmala Bonat (Nirmala), who was the applicant's previous maid at the material time. Nirmala lodged a report against the applicant claiming that the applicant had abused her in four separate incidents. The applicant was said to have scorched her with a hot iron and scalded her with hot water on three separate occasions sometime in

January, March and April 2004. Further, the applicant had also hit her with a metal cup on 17 May 2004. These four incidents constitute the subject matter of the four charges.

[6] The Sessions Court found the applicant guilty on the first three charges and sentenced the applicant to 18 years imprisonment for each charge. The terms of imprisonment were ordered to run concurrently. The applicant was acquitted of the fourth charge.

[7] Dissatisfied, the applicant appealed to the High Court. The prosecution filed a cross-appeal against the acquittal in respect of the fourth charge. On 3 December 2009, the High Court decided as follows:

(a) the applicant's appeal against conviction in respect of the first and second charges was dismissed;

(b) the applicant's appeal in respect of the third charge was allowed. Both the conviction and sentence were set aside.

(c) the prosecution's appeal against the applicant's acquittal in respect of the fourth charge was allowed. The applicant was sentenced to two years' imprisonment;

(d) the applicant's appeal against sentence with regard to the first and second charges was allowed. The sentence was reduced from 18 to five years each; and

(e) the sentences in respect of the first and second charges as well as the fourth charge were ordered to run consecutively.

[8] In effect, the total sentences imposed by the High Court against the applicant was for 12 years.

[9] The applicant then filed an appeal to this court. As stated earlier, her appeal was heard on 1 October 2012 and was dismissed. She is currently serving her sentence of 12 years' imprisonment.

[10] While the criminal proceedings were ongoing, Nirmala had also commenced a civil suit against the applicant and her husband, where she claimed damages for the injuries sustained. However, the civil proceedings were proceeded with only after the conclusion of the criminal appeal before this court.

Submissions

[11] The main thrust of the applicant's submissions is that Nirmala has proffered two conflicting sets of evidence. One version in the criminal trial and a completely contradictory version in the civil trial, brought upon later against the applicant. These conflicting versions, according to the applicant,

strike at each other, completely eroding the integrity of Nirmala's evidence at the criminal trial such that it can be said that the applicant could have been convicted on evidence which does not represent the truth. Against this backdrop, learned counsel for the applicant highlighted the following:

(a) At the criminal trial, Nirmala said she was not abused in September, October and November 2003. However, this contradicted her police report (P34) where she said she was abused from the day she started work, that is, in September 2003.

(b) There appears to be a conflicting version as to whether her back or front was first scorched by the hot iron. Nirmala said that the hot iron was placed on her back in January 2004. Then she changed her version by saying that the hot iron was placed on her front before the back and this was in March or April.

(c) There were contradictions as to when she was scalded with hot water on her right thigh. In the criminal trial, she gave three versions. The first version was that in April 2004. The second version was that it was on 17 May 2004. The third version was that she could not remember. In the civil suit, there were five different versions given. First, it was her pleaded case that it took place in March 2004; second, in her witness statement she stated it was March or April; third, she could not remember at all; fourth, she said it was between March and April and fifth, she agreed in the criminal trial that she said it was on 17 May 2004.

(d) There is an impending question as to whether the splashing of hot water on her thigh and her feet were two separate incidents or one incident. In the criminal trial, she said they were two separate incidents. However, in the civil suit, she said the splashing of the thigh and feet were one incident.

(e) There is an impending question as to when her breasts were scorched with the hot iron. In examination-in-chief, in the criminal trial, she said it was in March 2004. In cross-examination, she said she could not remember. She then said that the scorching of the breasts took place first before the scorching of the back, contradicting her earlier version that her back was scorched first. In the civil suit, there were two versions given. First, it was in her pleaded case and her oral evidence that it took place in March or April; second, she contradicted the above first version by saying she could not remember.

(f) There is contradiction as to whether Nirmala was wearing a bra when she was scorched. In the criminal trial, Nirmala said she was wearing a bra. In the civil suit, she gave three contradictory versions. First, she was not wearing a bra; second, she did not agree she told the criminal

court that she wore a bra; third, in re-examination, she said she did not wear a bra and when asked to explain the contradiction between her evidence in the criminal court and the civil court, her response was "saya tak pakai coli saya tidak ingat."

(g) There is an impending question as to whether Nirmala fought or struggled during the incident when she was scorched. In the criminal trial, she said she "tidak melawan kerana saya sebagai pembantu." In the civil suit, she said she fought back and she further added that she could not remember that in the criminal court she had said that she followed instructions and stood still as she was just a maid.

(h) There is contradiction as to whether Nirmala injured her hand when she was scorched on her breasts. In the criminal trial, she gave two different versions. First, she said her right hand was injured by the iron. She later contradicted her earlier testimony by saying that her hand was injured when she was washing the toilet when she was scalded. In the civil suit, she gave two different versions; first, she said it was the left hand not the right; second, the above first version contradicted her witness statement where she said it was the right hand.

(i) There is contradiction as to whether the applicant had scratched her face when she was hit with the steel mug. In the criminal trial, she said that the applicant scratched her face before she was hit with a mug. In the civil suit, she gave two versions that contradicted her version in the criminal trial. First, in cross-examination, she agreed that she was scratched before she was hit with a mug; second, in re-examination, she said that the scratches were made on different occasions, not on 17 May 2004, the day she was hit with the mug.

(j) There is a contradiction as to what Nirmala did with the mug after she was hit – in the criminal trial, she said she threw the mug. In the civil suit, she said she put the mug on the kitchen counter.

(k) On the aspect of what she was doing before she was being hit with the mug – in the criminal trial, she said she was cleaning the kitchen before she was hit. In the civil suit, she again contradicted her evidence given in the criminal court. She said she was cleaning her employer's room windows and after that she was hit with the mug.

(l) On the issue of the applicant taking hot water intending to splash on Nirmala after hitting her with the mug – in the criminal trial, she said after being hit with the mug, the applicant took hot water intending to splash on her. In the civil suit, she did not see what the applicant took to splash her.

[12] Based on the above, it was submitted by counsel for the applicant that there are serious (a) inherent contradictions in Nirmala's evidence in the criminal trial, (b) inherent contradictions in her evidence in the civil suit and (c) irreconcilable contradictions between her evidence in the criminal trial when compared with her evidence in the civil suit which has the effect of undermining the thrust of what she testified in the criminal trial. Thus, learned counsel strenuously argued that there was a miscarriage of justice and as a reason thereof, an intervention of this court was necessary.

[13] Learned Deputy Public Prosecutor submitted that the applicant's application did not meet the required threshold which warranted this court to exercise its review jurisdiction. To this end, learned Deputy Public Prosecutor highlighted that there were no material contradictions between the testimony of Nirmala in the criminal suit and the civil suit. Further, learned Deputy Public Prosecutor emphasised that questions of fact are not subjected to review.

Findings

[14] The principles of law pertaining to a review application is settled. It is clear on principle and on authority that only in a very limited and exceptional circumstances that this court as an apex court has an inherent jurisdiction to review, and if the circumstances so warrant to set aside an earlier decision made. It has been said many times that this court in exercising such powers, should not position itself as if it was hearing an appeal. In a review application, it is not the duty of the court to re-examine the final verdict reached by the previous panel with a view of coming to a different conclusion. Such an exercise must only be undertaken sparingly and with circumspection, a proper sense of responsibility and wisely to remove any injustice. (see *Ahmadi Yahya v. PP* [2012] 7 CLJ 113; [2012] 6 MLJ 37).

[15] Now, reverting to the specifics of the instant case, it is clear that the crux of the grounds on which this application was based on is the allegation by the applicant that there are material contradictions between Nirmala's testimony in the criminal matter as opposed to her testimony in the civil matter. According to the applicant, these material contradictions make Nirmala a non-credible witness. From the grounds we have reproduced in the preceding paragraphs, we can infer that the applicant alleges the following contradictions:

(a) on the issue of when the abuse actually occurred;

(b) where the injuries happened ie, which part of the body; and

(c) the extent and grievousness of the complainant's injuries.

[16] We have carefully deliberated on the grounds raised. With respect, we find that this application is devoid of merits. In our judgment, we find that the grounds relied on by the applicant to urge this court to review its previous decision are matters of fact. It is trite law that an appellate court should be slow in disturbing the finding of fact by the lower court, more so in a review application. In this regard, the Federal Court in *Asean Security Paper Mills Sdn Bhd v. Mitsui Sumitomo Insurance (Malaysia) Bhd* [2008] 6 CLJ 1 had explicitly cautioned that the review jurisdiction should never be allowed to be used to question a finding of a court on questions of fact. The Federal Court in the said case held that:

> [12] ... the review jurisdiction should never be allowed to be used to question a finding of this court in an appeal on question of facts.
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> [13] That leads us to the instant application. What is this applicant seeking to do? It is simply to ask this court to exercise its review jurisdiction to set aside the decision of this court overturning the finding of facts made by the Court of Appeal and reinstating the decision of the trial judge on the facts. That is clearly outside the scope of the review jurisdiction of this court. To allow the application is to invite all the vices that this court has been repeatedly warning against ie, there will be no finality in its judgment and, it will encourage judge-shopping.

[17] Thus, we are of the view that by principle, it is not open to this court to upset the findings of fact or venture into questions of fact which have become final. This court, in exercise of its review jurisdiction, should not be making any roving inquiry into questions of fact in order to arrive at a different finding. The truth or otherwise of the allegations made in evidence recorded in the civil case, as the case may be here, cannot be dwelled into by this court in exercise of its review jurisdiction. This court would interfere only with a view to prevent the abuse of the process of any court or otherwise to secure the ends of justice. This court would only interfere in an extraordinary situation where the conviction recorded upon the accused would result in manifest injustice to the concerned.

[18] Viewed in the said background, we are of the view that the applicant had not made out any case whatsoever warranting interference of this court. We find that the applicant has not satisfied that there is any probability of the Court of Appeal's earlier judgment being wrong and that injustice had occurred to the applicant.

[19] In this application, we find that what the applicant was in effect asking this court to do was to reopen or review the evidence which had already been heard and finally determined by this court. In other words, the applicant is trying to turn this application into an appeal, which was the very thing an apex court should avoid doing. As stated earlier, in a review application it is not the duty of the court to re-examine the final verdict reached by the previous panel with a view of coming to a different conclusion.

[20] Having regard to the true nature of the present application, it is our judgment that the applicant has not satisfied the threshold required for a review. Thus, in our considered view, the instant application did not fall within the very limited grounds and very exceptional circumstances in which a review may be made by this court of its own decision. As a result, it must be dismissed.

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